

## **Question and Answers on the Coronavirus Job Retention Scheme (CJRS)**

**1 June 2020**

### **Q Is the CJRS now extended ?**

A Yes .The government announced that the CJRS will be extended until the end of October 2020 ( I cannot see it being further extended then ) with some flexibility for employers from 1 July 2020.

### **Q What Flexibility ?**

A From 1 July 2020, employers can bring employees , previously on furlough, back to work on a part-time basis . This is a month earlier than previously expected. The grant and the £2,500 cap on the furlough grant will be reduced in proportion to the hours then worked.

### **Q What are the other material changes ?**

A Employees will continue to receive the 80% of their current wages, capped at £2,500 a month and subject to PAYE and National Insurance contributions. However, for payments made to furloughed employees from 1 August, employers will have to pay Employer's NI and pension contributions ( these costs are reimbursed for now ) . And from 1 September , employers will have to contribute towards the salaries of their furloughed staff. 10% of wages (up to £312.50) plus employer national insurance and pension contributions .And from 1 October 20% of wages (up to £625 ) when the government's contribution will reduce to 60%.

### **Q Please clarify the position on pensions ?**

Until the end of July, employers can reclaim the minimum mandatory employer pension contribution. This claim can be ( where an employee's earnings make this necessary ) made on top of the £2,500 cap. The minimum contribution under the auto-enrolment regulations is 3% of an employee's income above £520 per month (from 6 April 2020). Pension contributions over and above this cannot be claimed through the scheme but need to be maintained if there is a contractual commitment to pay at a certain rate . And from 1 August onwards , pension contributions cannot be reclaimed .

### **Q What about other benefits in kind ?**

A If they are contractual, they should be continued e.g. private health insurance or reimbursed mobile phone charges . Unless otherwise agreed or provided for in the employment contract . E.g. if a company car is still provided it may only be available for business purposes and a furloughed employee is not undertaking any company business so , in those circumstances, it could be withdrawn. But the cost of any *continuing* benefits other than pension ( for now ) cannot be reclaimed as part of the furlough scheme. As for benefits which are discretionary e.g. Tronc, Commission, most overtime and Bonuses ( though advice on annual bonuses is sensible as this throws up some complications ) , no payment need be made to the furloughed employee by the employer and so none are recoverable through the government scheme.

**Q Are all employees covered by the scheme?**

A Yes . Even zero hours workers. And irrespective of whether full time or part time and irrespective of length of service provided they were employed as of March 19 .

**Q Are self-employed individuals or workers , who are not employees , eligible for the furlough scheme?**

A No. The self-employed do of course have their own scheme with different rules.

**Q What about employees on maternity leave?**

A The government guidance says that employers can claim for enhanced maternity pay through the furlough scheme. This suggests that employers can furlough employees on maternity leave. If an employee on maternity leave agrees to be furloughed, then an employer will be able to reclaim their SMP in the normal way and be able to claim for any enhanced contractual pay on top through the furlough scheme. Currently, employers can reclaim 92% of SMP (or 103% if they qualify for Small Employers' Relief). Employers cannot claim the 8% balance of SMP through the furlough scheme.

**Q What about employees from outside the UK on work visas?**

A All foreign nationals are eligible if legally working in the UK and paying UK PAYE. Employers can furlough employees on all categories of a current work visa.

**Q Can furloughed employees do *some* work for their employer when furloughed ?**

A Not until July . Until then no furloughed employee can work at all for their employer ( through they can do other work for other businesses, interestingly ) . After July 1 furloughed employees can do some part time work for their employer. Because they are paid for that work however this is therefore money the government does not have to reimburse.

**Q What does an employer pay an employee on flexible furlough for the hours they are working?**

A For worked hours, they will need to pay whatever is due under the employee's contract ( so on a pro rata basis ) and be responsible for all tax and NICs due on those amounts. Pay cuts can be agreed but not unilaterally imposed.

**Q Must all furloughed employees do some work from July to continue to claim the grant?**

A No, flexible furloughing is only an option. Employees can continue full furlough arrangements after July and until October 31 albeit contributing to the cost.

**Q Does an employer need a (new) furlough agreement from July when the rules change?**

A No . Unless an employer wants to reduce furlough pay between July and October or have an employee undertake some flexible furlough work which is then allowed.

**Q Is there a minimum or maximum number of working hours for employees on flexible furlough?**

A No , and it is expected this can change from week to week and by agreement .

**Q Can employers put employees who are currently not furloughed onto a flexible furloughing arrangement?**

A Yes, but if not furloughed them before then they will need to be put on furlough by 10 June, so that they have spent 3 weeks on full-time furlough by the time the furlough scheme closes to new entrants on 30 June.

**Q Can employees not already on the furlough scheme still join now ?**

A Yes if they were employed on a PAYE basis on 19 March ( initially it was 28 February as the cut-off point ) with the proviso that employers cannot be in default with HMRC and the scheme will close to new entrants from 30 June. This means that the last date for employees to be furloughed for the *first* time is imminent ( 10 June).To enable them to complete the minimum 3 week furlough period by 30 June.

**Q Are there are limitations employers need to be aware of for the new flexible furlough scheme?**

A From 1 July, when the new flexible furlough scheme will become available, employers will not be able to claim for more employees than the maximum number claimed for under any previous claim. Practically, this means that employers will need to work out the maximum number of furloughed employees for July onwards and ensure that at least this number has been furloughed for June .

**Q Can an employee refuse to consent to an extension of furlough?**

Yes. Written agreement is needed though this can be presumed from an employer giving written details an employee agrees with/accepts .

**Q Can employees put themselves on furlough ?**

A No. The employer needs to designate them as furloughed. And specify the the main terms and conditions upon which the employee will cease all work in relation to their employment or work part time from July and the terms of this. Records need to be kept at least 5 years.

**Q Can an employer ask employees to undergo training while furloughed?**

A Yes. In fact, the guidance says that furloughed employees should be encouraged to undertake training.

**Q If the employer cannot afford to make the minimum contribution required then what are the options?**

A The Government have made clear that employer contributions from August are mandatory if employees are receiving the grant. If employers cannot make their contribution, then they will need to end furlough for their employees as of 31 July or at whatever point the increasing contributions are unmanageable. Hence the consideration of putting employees at risk of redundancies now for some employers.

**Q Can an employer make employees redundant under the scheme?**

The government previously indicated that the CJRS was an alternative to redundancy, lay-off or unemployment. However, the guidance for employees also says that employees can be made redundant while on furlough and the employee guidance says that "your employer can still make you redundant while you are on furlough or afterwards". And so, whilst employers should not be abusing the scheme it is clear that employees can be dismissed through redundancy whilst furloughed.

**Q Can an employer give notice to an employee on furlough?**

A Yes . Although the guidance does not explicitly say this. However, if so, employee wages need to be paid in full and making payments in lieu will have to be reconsidered because such a payment will not , in my view, be covered by the scheme.

**Q What about redundancy consultation?**

A A redundancy is not automatically a fair dismissal . A fair process needs to be followed including meaningful consultation and a fair selection for those with over 2 years' service. Neither the guidance for employers nor for employees explicitly says that collective or individual redundancy consultation can be carried out during furlough but my view is that it can take place then and that e.g. such " consultation " cannot be categorised as " work " thereby falling foul of the CJRS rules in place until the end of June 2020.

**Q Does this mean employees can work out their notice whilst furloughed too?**

A Yes , although an employer will have to make up their salary to 100% of normal pay .

**Q Will notice pay include Tronc payments?**

A As mentioned above discretionary payments are not due to employees who are furloughed nor are they due as part of notice pay. So Tronc is only payable where this sum amounts to contractual wages and in most businesses , this is not the case . Which is why they are not ( controversially and some say unfairly given tips are expected and a significant proportion of employee earnings for most restaurant workers ) able to be included in furlough payments claimed back from the government.

**Q Will employees continue to accrue continuous service during furlough?**

A Yes.

**Q And holidays?**

A Yes because they remain employed . Employees will retain their right to 5.6 weeks' annual leave under the Working Time Regulations .

**Q But can an employer make employees take accrued and accruing holidays?**

A Yes under the current rules and provided notice is given , twice as much as the holiday to be taken. So, if a 1 week holiday is required from July 1 notice must be given by mid-June. Employers are asked under the CJRS to be considerate about insisting on employees taking holiday whilst on furlough leave but , now the lockdown has eased a

little , the request is more easily justified. And of course, it will avoid employees returning to work and immediately going on vacation.

**Q Can an employer instead ask them to carry over holiday to a new holiday year?**

A Yes up to 4 weeks of unused holiday and up to 2 holiday years ahead.

**Q Can an employer make an employee take owed holidays during any period of notice?**

A Yes . And there should be no excess cost involved . Take an employee on 4 weeks' notice and with 2 weeks accrued holiday to take in that time . If they are dismissed during furlough leave then the real , as in "extra" , cost of this to the employer , compared to the then furlough reimbursement , will only be 20% of 4 weeks' pay. The same excess cost if no holiday was deemed to be taken during the notice period.

**Q Do employers have to top up wages for those employees who are on furlough but not receiving the minimum wage?**

A No. Workers are only entitled to the National Minimum Wage for the hours they are working.

**Q Can an employer make some people redundant and furlough others?**

Yes. The guidance clearly says that you do not need to place all employees on furlough.

**Q How does an employer calculate regular wages?**

A For salaried employees, employers must use the actual salary before tax, as of 19 March 2020. For employees whose pay varies (for example because they work different hours each month), an employer must use and can claim for the higher of either the same month's earnings from the previous year or average monthly earnings from the 2019-20 year .

If an employee with variable pay has been employed for less than a year, the employer can claim for an average of their monthly earnings since the employee started work. The government guidance makes clear that no grant will be declined, or repayment sought based solely on the choice of pay calculation used by the employer .Provided a reasonable choice of approach is taken.

**Q What about sick workers?**

A The guidance says that employees who are currently off sick can be still be furloughed for business reasons. This applies primarily to long-term sickness absence. In which case the employee would then no longer receive sick pay and should be paid the same as other furloughed employees. This may benefit the employee ( if they only had SSP beforehand ) and may benefit the employer ( if the employees were being paid their normal wages whilst sick ) . SSP is currently £95.85 a week.

If an employee becomes sick while on furlough, it is up to the employer to decide whether to move them onto SSP ( subject to the employment contract terms ) or to keep them on furlough. If the employee remains on furlough, the employer can continue to claim their salary through the furlough scheme. If the employee is moved onto SSP, the employer will have to pay this and can , of course , no longer claim their salary through the furlough scheme. However, employers with fewer than 250 employees can use the new Coronavirus

Statutory Sick Pay Rebate Scheme which will repay up to two weeks' SSP for employees who are unable to work because they have coronavirus, cannot work because they are self-isolating at home or are shielding in line with public health guidance.

**Disclaimer** Like all employment issues , and especially the sometimes complex and relatively new CJRS rules and evolving government guidance , it is difficult to give general guidance as opposed to advice on individual situations . The advice above , believed to be correct as at June 1 2020, should not be relied upon without getting such specialist advice , on any particular question arising , whether from me or someone else .

TIM Russell

Solicitor